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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS ANTHONY UCCI,

Defendant and Appellant.

B289352

(Los Angeles County  
Super. Ct. Nos. BA443667,  
BA443668.)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Bernie C. Laforsteza, Judge. Affirmed.

Andrea Keith, under appointment by the Court of Appeal, for  
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Appellant Nicholas Anthony Ucci pled guilty to burglary (Pen. Code, § 459)<sup>1</sup> and battery causing serious bodily injury (§ 243, subd. (d)) and was placed on probation. After Ucci admitted violating his probation in both cases, the court sentenced him to prison. Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Ucci was charged with burglary (*People v. Ucci* (Super. Ct. L.A. County, 2018 No. 443667)) and battery causing serious bodily injury (*People v. Ucci* (Super. Ct. L.A. County, 2018 No. 443668)), which came under the jurisdiction of Los Angeles County after transfer from San Diego County. Ucci pled guilty to both charges in September 2014 and was placed on probation.<sup>2</sup>

Ucci admitted violating probation three separate times. First, on July 19, 2016, Ucci admitted violating probation for failing to report. The court awarded credit for time served, and probation was reinstated with conditions. On May 12, 2017, Ucci again admitted violating probation for failing to report. The court ordered that Ucci serve 90 days in prison. Probation was reinstated under the condition that Ucci waive all previous credits.

For a third time, on February 1, 2018, Ucci admitted violating probation for failing to report. The court informed Ucci of the consequences of waiving his right to a probation violation hearing and admitting his probation violation, which included the imposition of a four-year sentence consisting of the midterm on the burglary charge. The court also informed Ucci that both convictions would be considered prior prison terms under section 667.5. Ucci indicated he understood the consequences and confirmed that no one had threatened or forced him to waive his right to a probation violation hearing or to admit the probation violation. The court found Ucci

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<sup>1</sup> All further unspecified references are to the Penal Code.

<sup>2</sup> The record contains only Ucci's plea of guilty to the battery charge. However, the abstract of judgment indicates that Ucci was convicted of both crimes – the 2013 battery and the 2014 burglary – by plea on September 19, 2014. Counsel's *Wende* brief states that Ucci pled no contest to both crimes.

had made a knowing, voluntary and intelligent waiver. Probation was revoked, and the court sentenced Ucci to four years in prison, with 362 days of credit.

Ucci filed a petition for writ of habeas corpus in Los Angeles Superior Court, arguing that his probation violation admission was in error because he received ineffective assistance of counsel. On April 3, 2018, the court denied the petition based on Ucci's failure to serve the district attorney a copy of the petition.<sup>3</sup> Ucci filed a notice of appeal, and a certificate of probable cause was granted. Ucci challenged the probation officer's desertion report, which he claimed falsely represented that Ucci failed to report to probation on July 13, 2017.<sup>4</sup> Ucci pointed to unauthenticated evidence of a voicemail uploaded online, allegedly from the probation officer on July 13, 2017, asking Ucci not to report to probation because his file was incomplete. Ucci claimed his attorneys withheld this key evidence from the court without his knowledge.

Court-appointed counsel filed an opening brief setting forth the facts of the case and asking this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Ucci filed supplemental briefs on November 30, 2018, December 20, 2018, and January 25, 2019 arguing: (1) that he is innocent of the underlying crime of burglary, and was coerced by the judge in San Diego County into pleading guilty; (2) that his sentence as a result of his probation violation is a double jeopardy violation of his constitutional rights; (3) that he received ineffective

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<sup>3</sup> Ucci claims he filed a subsequent writ of habeas corpus, which was denied by Judge Eleanor Hunter in a minute order which noted: "The Petition raises issues that could be raised on appeal and were not." The minute order is not contained in the record before us. The alleged writ of habeas corpus, attached as an exhibit to his supplemental brief, was signed by "AJ George" on August 11, 2018 and does not appear to have been filed. AJ George, the mother of Ucci's son, stated in the petition that Ucci was not guilty of burglary because he was given a key to the car he allegedly burglarized.

<sup>4</sup> The desertion report, prepared on August 22, 2017, indicated that Ucci had failed to report on July 13, 2017; "nor has he since reported. Currently the [probation officer] has no means of contacting [Ucci]."

assistance of counsel because the alleged voicemail from the probation officer established Ucci did not violate probation, and his defense counsel withheld this key evidence from the trial court; and (4) that the trial court erred by relying on the probation officer's false report.

## DISCUSSION

Although Ucci's arguments are largely concerned with challenging the underlying crime, the scope of our review is limited to the issue before us on appeal: whether any arguable appellate issue exists in the trial court's imposition of a prison sentence following Ucci's admission that he violated probation for the third time.<sup>5</sup> After independently examining the entire record, we find no arguable appellate issues.

We review a trial court's decision to reinstate probation or sentence a defendant to prison for abuse of discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.) While Ucci now claims he did not violate the conditions of his probation, at the probation violation hearing he expressly admitted violating those conditions by failing to report. He confirmed he

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<sup>5</sup> We do not address Ucci's challenge to the validity of his burglary conviction. Ucci failed to raise the issue directly by timely appeal from the prior judgment, and waited more than three years before collaterally challenging it here. (See *In re Ronald E.* (1977) 19 Cal.3d 315, 321-322 [collateral challenge to a prior conviction may be denied for lack of diligence]; Cal. Rules of Court, rule 8.308(a) [criminal appeal must be filed within 60 days of the rendition of judgment or the making of the order being appealed]; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421 ["an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.]."]") We would reject Ucci's challenge to the underlying crime even if we were to consider it. "A person who pleads guilty to a criminal offense cannot thereafter raise issues relating to his guilt or to the procedures which would otherwise be required to establish his guilt. He may only raise issues which, if true, would preclude the state from prosecuting him despite his guilt." (*People v. Turner* (1985) 171 Cal.App.3d 116, 126-127); see also *People v. LaJocies* (1981) 119 Cal.App.3d 947, 956 ["all errors arising prior to entry of a guilty plea are waived, except those which question the jurisdiction or legality of the proceedings resulting in the plea"].)

understood the consequences of admitting his probation violation and waived his right to a probation violation hearing; the court found he had made a knowing, voluntary and intelligent waiver. The sentence imposed by the court was authorized by law, and the court did not abuse its discretion when it revoked probation and imposed the sentence following Ucci's multiple violations. (*Id.* at p. 910 [no abuse of discretion in sentencing appellant to prison following admission of probation violation and based on "demonstrated lack of commitment to carrying out the terms and conditions" of probation].)<sup>6</sup>

Ucci's challenge to the evidence supporting the trial court's findings that he violated his probation are of no consequence in view of his admission to the probation violation. (See *People v. Turner*, *supra*, 171 Cal.App.3d at p. 125 ["[A] plea of guilty waives any right to raise questions regarding the evidence, including its sufficiency or admissibility, and this is true whether or not the subsequent claim of evidentiary error is founded on constitutional violations."].) Ucci's contentions that the probation officer falsified the desertion report that led to his imprisonment, and that the court relied on such falsehoods in its decision, are not supported by the record.<sup>7</sup>

Finally, Ucci fails to show his counsel's ineffective assistance. Although Ucci argues that his attorneys concealed key evidence from the trial court

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<sup>6</sup> The double jeopardy defense, which prohibits a second prosecution for the same offense, does not apply to the revocation of probation. (See *In re Coughlin* (1976) 16 Cal.3d 52, 60-61 ["The probation revocation hearing . . . was not, of course, a second criminal prosecution, nor was it intended to authorize criminal punishment. . . . [T]he sole consequence of revocation of probation is that the offender must commence to serve a term for an offense of which he *previously* was properly convicted."])

<sup>7</sup> We do not consider the newly submitted, unauthenticated voicemail evidence which was not before the trial court. "It has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Furthermore, Ucci's persistent noncompliance with probation conditions was well-documented, even before the date of the alleged voicemail, and the desertion report clearly referred to Ucci's ongoing failure to appear for probation even a month after the alleged voicemail.

without his knowledge, leading to his coerced admission, the record indicates that Ucci was present for the entire hearing and made a knowing, voluntary waiver of his constitutional rights when he admitted his violation. Even assuming error, Ucci cannot establish that he suffered prejudice because the record makes his probation violations abundantly clear. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 [“[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”].)

Because our independent review of the record under *People v. Wende* discloses no arguable issue, we affirm the judgment. Ucci has, by virtue of counsel’s compliance with the *People v. Wende* procedure and our review of the record, received adequate and effective appellate review of the order denying his petition. (*People v. Kelly* (2006) 40 Cal.4th 106, 112.)

#### **DISPOSITION**

The judgment of the trial court is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.